

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF(PJC)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S RESPONSE TO "DEFENDANTS' JOINT
MOTION *IN LIMINE* TO PRECLUDE PLAINTIFFS [sic] FROM
ATTRIBUTING TO POULTRY DEFENDANTS ANY EVIDENCE
RELATED TO THE USE OF POULTRY LITTER BY CATTLE RANCHERS,
FARMERS, AND OTHER INDEPENDENT THIRD PARTIES" [DKT #2407]**

Plaintiff, the State of Oklahoma ("the State"), respectfully requests that the Court deny "Defendants' Joint Motion in Limine to Preclude Plaintiffs [sic] from Attributing to Poultry Defendants Any Evidence Related to the Use of Poultry Litter by Cattle Ranchers, Farmers, and Other Independent Third Parties" (DKT #2407).

I. Introduction

The gravamen of the State's Second Amended Complaint is that Defendants' birds raised at their own poultry operations and at their contract growers' poultry operations in the Illinois River Watershed ("IRW") generate an enormous amount of poultry waste each year, that Defendants are responsible for ensuring that this poultry waste is handled in a manner that does not cause pollution, that large quantities of this poultry waste are nevertheless land-applied in the IRW, and that this land-applied poultry waste runs off and leaches to the waters of the State, causing pollution.¹ For purposes of Defendants' liability for this pollution, it matters not whether

¹ Defendants persist in their efforts to mischaracterize the poultry waste transfer program. The State does not promote or encourage the land application of poultry waste in the IRW. The

it is a Defendant itself that has land-applied the poultry waste, a contract grower who has land-applied the poultry waste, or a third person who has land-applied the poultry waste.

Despite this fact, with their Motion, Defendants seek to preclude all evidence pertaining to the land application by third persons of poultry waste generated by Defendants' birds, apparently arguing that Defendants cannot be legally responsible for such poultry waste.^{2 & 3}

This is incorrect. In those instances where Defendants' contract growers have transferred poultry waste from their contract growing operations to third persons, as well as those instances where Defendants have transferred poultry waste from their own poultry operations to third persons, Defendants are liable for the environmental impacts of such poultry waste under, without limitation, theories of Restatement of Torts (Second) § 427B-type liability, 27A Okla. Stat. § 2-6-105(A) "cause to be placed" liability, 2 Okla. Stat. § 2-18.1 "cause" liability, and RCRA "contributor" liability. Accordingly, evidence pertaining to the land application of such waste by third persons is entirely appropriate under Fed. R. Evid. 402 and 403.

Oklahoma Litter Market referenced at page 2 of Defendants' Motion is a creation of the Oklahoma Poultry Waste Transfer Act (the "OPWTA"). The purpose of the OPWTA is "to encourage the transfer of poultry waste out of designated nutrient-limited watersheds and nutrient vulnerable groundwater as designated in the most recent Oklahoma's Water Quality Standards." See 2 Okla. Stat. § 10-9.13(A) (emphasis added). To that end, the Oklahoma Legislature directed the Oklahoma Department of Agriculture, Food and Forestry to "develop a plan to encourage the transfer of poultry waste out of designated nutrient-limited watersheds and nutrient-vulnerable groundwater as designated by the most recent Oklahoma's Water Quality Standards." See 2 Okla. Stat. § 10-9.13(B). The IRW has been designated a nutrient limited watershed by the Oklahoma Water Resources Board. See Okla. Admin. Code § 785:45-5-29. Plainly, nothing in the Oklahoma litter market constitutes the promotion of land application of poultry waste in the IRW. Rather, the purpose of this program is to protect the environment and the population from the risks of poultry waste through encouraging the removal of poultry waste from the IRW.

² Defendants do not seek to preclude evidence pertaining to their own land application of poultry waste or land application of poultry waste by their contract growers.

³ Defendants' Motion is particularly curious inasmuch as they have disclaimed any knowledge about the details about how the poultry waste generated by their birds is land-applied in the IRW. See DKT #2062 (Fact #40).

II. Defendants are liable for poultry waste generated by their birds that is land-applied by third parties in the IRW, and therefore evidence pertaining to such poultry waste is admissible under Fed. R. Evid. 402 and 403

A. Restatement of Torts (Second) § 427B-type liability

The contours and applicability of Restatement of Torts (Second) § 427B-type liability have been extensively briefed in connection with the State's Motion for Partial Summary Judgment. *See* DKT #2062, #2256 & State's Facts cited therein, incorporated by reference. Restatement of Torts (Second) § 427B provides that: "One who employs an independent contractor to do work which the employer knows or has reason to know to be likely to involve a trespass upon the land of another or the creation of a public or a private nuisance, is subject to liability for harm resulting to others from such trespass or nuisance." *See also* Restatement of Torts (Second) § 427B, cmt. b; *Weinman v. De Palma*, 232 U.S. 571 (1914); *Bleeda v. Hickman-Williams & Co.*, 205 N.W.2d 85 (Mich. App. 1972); *Peairs v. Florida Publ'g Co.*, 132 So. 2d 561 (Fla. 1st DCA 1961); *Shannon v. Missouri Valley Limestone Co.*, 122 N.W.2d 278 (Iowa 1963); *McQuilken v. A & R Development Corp.*, 576 F. Supp. 1023, 1033 (E.D. Pa. 1983); *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263 (N.D. Okla. 2003), *vacated in connection with settlement*. Restatement of Torts (Second) § 427B-type liability exists in Oklahoma. *See Tankersley v. Webster*, 243 P. 745, 747 (Okla. 1925) (acknowledging the rule that "where the performance of [a] contract, in the ordinary mode of doing the work, necessarily or naturally results in producing the defect or nuisance which caused the injury, then the employer is subject to the same liability as the contractor").

Poultry waste necessarily follows from the raising of poultry. Defendants have known or should have known that poultry waste generated by their birds is land-applied in the IRW and that the land application of this poultry waste is likely to (and in fact does) create a nuisance and

trespass in the IRW. That is to say, the foregoing is a foreseeable consequence of Defendants' arrangement with their respective contract growers. This is especially true since this Court in *City of Tulsa* made such a finding in 2003, a finding that certainly put these Defendants on notice of their Restatement § 427B-type liability. That certain contract growers might from time to time transfer the poultry waste generated by Defendants' birds to a third party for land application in no way changes the analysis. *See McQuilken*, 576 F. Supp. at 1033 ("[a]n employer or contractor is held liable for 'farming out' work which he knows, or has reason to know, will create a nuisance").⁴ The complained-of nuisance (including federal common law nuisance) and trespass in this case are likely to result from growing poultry irrespective of who land-applies the poultry waste.

The same analysis pertains to instances where Defendants have transferred poultry waste from their own poultry operations to third persons.

Simply put, because Defendants know or have reason to know that poultry waste generated by their birds is likely to result in a trespass or nuisance, under Restatement § 427B-

⁴ Additionally and alternatively, it is black letter law that the acts of an agent are, for purposes of liability, the acts of the principal and the acts of an employee are, for purposes of liability, the acts of its employer. *See Nelson v. Pollay*, 916 P.2d 1369, 1374 n.23 (Okla. 1996) ("*Qui facit per alium, facit per se* (the act of the employee is the act of the employer)"). The State has alleged that Defendants so control their contract growers that a principal-agent and / or employer-employee relationship exists, and has provided ample factual support for that allegation. *See, e.g.*, DKT # 2062 (Disputed Facts ##6-17); DKT # 2119 (Disputed Fact #9); DKT # 2125 (Disputed Fact #1); DKT #2131 (Disputed Fact #14); DKT #2166 (Disputed Fact #2). Thus, under the State's theory of the case, the acts of its growers are as a matter of law the acts of the respective Defendants. As pointed out above, the State has alleged that Defendants have known or should have known that the land application of poultry waste generated by their birds is likely to (and in fact does) create a nuisance. Thus, where Defendants' contract growers have transferred poultry waste from their contract growing operations to third persons, these transfers are viewed, as a matter of law, as transfers by Defendants. Under Restatement of Torts (Second) § 427B-type principles, Defendants are therefore liable for the environmental impacts of such poultry waste. Accordingly, evidence pertaining to the land application of such waste by third persons is relevant, not misleading, not confusing and not unfairly prejudicial.

type liability, Defendants are liable for the environmental impacts of the land application of that poultry waste regardless of who actually does the land application. Therefore, evidence pertaining to the land application of such waste by third persons is relevant, not misleading, not confusing and not unfairly prejudicial.

B. 27A Okla. Stat. § 2-6-105(A) "cause to be placed" liability and 2 Okla. Stat. § 2-18.1 "cause" liability

The issue of whether Defendants can be liable for the land-application by third persons of poultry waste generated by Defendants' birds under 27A Okla. Stat. § 2-6-105(A) and 2 Okla. Stat. § 2-18.1 was the subject of a motion for summary judgment by Defendants. *See* DKT #2057 at pp. 15-16 (Defendants' Motion) & DKT #2166 at pp. 16-18 (State's Response). The Court denied Defendants' motion for summary judgment. Therefore, with respect to land-application of poultry waste generated by Defendants' birds by third persons under claims asserted in Count 7, the relevancy of such evidence is self-evident. Moreover, there is no basis to contend such evidence would be misleading, confusing or unfairly prejudicial.

C. RCRA "contributor" liability

RCRA "contributor" liability has been extensively briefed by the State. *See* DKT #2062, #2253, #2125 & State's Facts cited therein, incorporated by reference. "Contributor" liability arises when one has "a part or share in producing an effect." *See Cox v. City of Dallas, Texas*, 256 F.3d 281, 294-95 (5th Cir. 2001). "[I]t is not necessary that a party have control over the ultimate decisions concerning waste disposal or over the handling of materials at a site in order to be found to be a contributor within the purview of RCRA." *United States v. Valentine*, 885 F. Supp. 1506, 1512 (D. Wyo. 1995). Indeed, "contributor" liability is intended to reach more broadly than the common law. *See* S. Rep. No. 96-172 (1980) ("Section 7003 should not be construed solely with respect to the common law. Some terms and concepts, such as persons

"contributing to" disposal resulting in a substantial endangerment, are meant to be more liberal than their common law counterparts"); *see also United States v. Aceto Agricultural Chems. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989), *reh'g denied* ("RCRA is a remedial statute, which should be liberally construed").

Given that the common law principle reflected in Restatement § 427B-type liability encompasses land application of poultry waste by third persons, the reach of RCRA "contributor" liability is more than sufficient to encompass land application of poultry waste by third persons. Inherent in Defendants' business model for raising their birds in the IRW is the generation of an enormous quantity of phosphorus-laden poultry waste that will be disposed of in a very limited geographical region that is highly susceptible to water pollution from phosphorus. Defendants raise tens of millions of birds in the IRW annually. These birds generate hundreds of thousands of tons of poultry waste annually. Defendants know that it is the practice to apply the poultry waste generated by their birds on the land in the IRW. Defendants know that significant amounts of poultry waste from each Defendants' birds has been land-applied in the IRW. Defendants know that this poultry waste is generally land-applied in close proximity to the poultry house where it has been generated and in a concentrated time-frame. Defendants know that poultry waste has been over-applied in the IRW. Defendants know that the IRW is highly susceptible to water pollution from phosphorus and bacteria. Defendants can control the land application of poultry waste. These facts taken together clearly demonstrate that Defendants "have a part or share in producing" not only the enormous volumes of poultry waste, but also the circumstances under and manner in which that poultry waste is handled and disposed of in the IRW. It matters not under RCRA "contributor" liability who actually land-applies the poultry waste generated by Defendants' birds. It is enough that Defendants have "a part or share in

producing" the conditions under which such poultry waste is land-applied. Therefore, evidence pertaining to the land application of such waste by third persons is relevant, not misleading, not confusing and not unfairly prejudicial.

III. Conclusion

WHEREFORE, premises considered, "Defendants' Joint Motion in Limine to Preclude Plaintiffs [sic] from Attributing to Poultry Defendants Any Evidence Related to the Use of Poultry Litter by Cattle Ranchers, Farmers, and Other Independent Third Parties" should be denied.

Respectfully Submitted,

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